Supreme Court, U.S.
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No. 00-767

In The

Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

ENRICO ST. CYR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent is a longtime legal permanent resident who is subject to a final order of removal. The Board of Immigration Appeals ruled that he is statutorily barred from applying for discretionary relief under former 8 U.S.C. 1182(c) (1994) in light of 1996 amendments to the Immigration and Nationality Act. Respondent sought review of the Board's legal ruling in a habeas corpus action under 28 U.S.C. 2241. The court of appeals, under the authority of a simultaneously-issued companion case, *Calcano-Martinez v. INS*, held that the district court properly exercised habeas corpus jurisdiction. On the merits, the court of appeals held that the Board erred as a matter of law and that respondent is eligible to apply for a Section 1182(c) waiver. The questions presented are:

1. Whether the district court had habeas corpus jurisdiction over respondent's statutory retroactivity and constitutional due process challenge to his final order of removal.

2. Whether aliens in removal proceedings may be eligible to apply for relief under former 8 U.S.C. 1182(c) if they pled guilty before the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

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OPINIONS BELOW

Respondent adopts petitioner's statement of the opinions below. The court of appeals' opinion is now reported at 229 F.3d 406.

JURISDICTION

Respondent adopts petitioner's statement of jurisdiction.

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the provisions referred to in the *certiorari* petition and reprinted in the petitioner's Appendix:

U.S. Const., Art. III, provides, in relevant part:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . "
>
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . to Controversies to which the United States shall be a Party; . . . "

U.S. Const., Amend. V provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . "

STATEMENT

This case concerns jurisdictional and substantive amendments to the Immigration and Nationality Act (INA) made in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, that govern the removal of longtime legal permanent resident immigrants who are deportable based on their past criminal convictions. The jurisdictional issue is whether the court of appeals correctly determined that respondent's statutory and constitutional challenge to his final order of removal may be heard in a district court habeas corpus action. The merits issue is whether AEDPA's amendment to, and IIRIRA's subsequent repeal of, 8 U.S.C. 1182(c) (1994) applies retroactively to respondent's pre-AEDPA/IIRIRA guilty plea.

There is no compelling reason to grant *certiorari* on the jurisdictional question because the disagreement among the circuit courts simply maintains a difference that this Court has previously declined to review. If, however, the Court determines that review is now warranted on the jurisdictional question, respondent respectfully submits that *certiorari* should be granted in *Calcano-Martinez v. INS*, Nos. 98-4033 et al., 2000 WL 1336611 (2d Cir. Sept. 1, 2000), *petition for cert. filed*, (Dec. 20, 2000), in lieu of – or at a minimum in addition to – this case because *Calcano-Martinez* better presents the complete jurisdictional question.

Certiorari should also be denied on the merits question because: (1) the court of appeals' ruling represents nothing more than an application of well-developed retroactivity jurisprudence that this Court has articulated and clarified in four recent decisions, (2) the court of appeals' decision applies to a closed and diminishing set of cases, and (3) the specific retroactivity issue presented here was correctly decided and has been squarely addressed by only two circuits, which agree on the applicable retroactivity test and disagree only marginally on the application of that test to the facts of a particular subset of cases.

THE STATUTORY FRAMEWORK

Respondent generally agrees with the petitioner's description of the statutory framework and makes only the following points.

1. *Relief from Deportation.* Legal permanent residents who become deportable based on criminal convictions have long been entitled to apply for discretionary relief if they meet the statutory eligibility criteria. *See* 8 U.S.C. 1182(c) (1994) (requiring that the immigrant must be a legal permanent resident, must have seven consecutive years of residency, and must not have served five years or more for an "aggravated felony"). In the years preceding the amendments at issue here, over half of the total number of applications for Section 1182(c) relief were granted. *See* Pet. App. 28a; *Tasios v. Reno*, 204 F.3d 544, 551 (4th Cir. 2000) (relying on U.S. Department of Justice statistics).

In 1996, Congress twice legislated with regard to Section 1182(c). In AEDPA, Congress restricted eligibility for Section 1182(c) by expanding the number of disqualifying criminal convictions, among which are various non-violent and non-aggravated offenses. *See* AEDPA 440(d). In IIRIRA, Congress repealed Section 1182(c) and replaced it with a new form of discretionary relief for immigrants who become deportable based on a criminal conviction. *See* IIRIRA 304(a), (b).

The Board of Immigration Appeals (BIA or Board) initially held that AEDPA 440(d) did not apply retroactively to Section 1182(c) applications that were pending when AEDPA was enacted. *See In re Soriano*, Int. Dec. No. 3289, 1996 WL 426888 (BIA June 27, 1996). The Attorney General overturned the BIA's decision and ruled that the AEDPA restrictions applied to *all* pending immigration cases. *See id.* (AG Feb. 21, 1997).

Eight courts of appeals reversed the Attorney General's decision, and most held that AEDPA's amendment to Section 1182(c) did not apply to cases where the immigration proceedings commenced before AEDPA's passage, even if the Section 1182(c) application had not yet been filed.[1] Only the Seventh Circuit initially agreed with

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[1] *See Goncalves v. Reno*, 144 F.3d 110, 126-33 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Wallace v. Reno*, 194 F.3d 279, 282-87 (1st Cir. 1999); *Henderson v. INS*, 157 F.3d 106, 128-30 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 526 U.S. 1004 (1999); *San .oval v. Reno*, 166 F.3d 225, 239-42 (3d Cir. 1999); *Tasios v. Reno*, 204 F.3d 544, 548-52 (4th Cir. 2000); *Pak v. Reno*, 196 F.3d 666, 675-76 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719, 724-25 (8th Cir. 1999), *reh'g denied* (1999); *Magana-Pizano v. INS*, 200 F.3d 603, 610-11 (9th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289, 1301-04 (11th

the Attorney General's ruling, but that circuit later retreated from its view in a significant respect.[2] This Court has declined to review the circuit court decisions governing eligibility for Section 1182(c) relief in light of AEDPA 440(d).[3] On July 18, 2000 the Attorney General published a proposed rule that would adopt the view of the majority of circuits and render AEDPA 440(d) inapplicable to immigrants whose deportation proceedings commenced before AEDPA's enactment. *See* 65 Fed. Reg. 44,478 (2000); Pet. Br. 6 n.4. The proposed rule does not address immigrants, like the respondent, who are in removal proceedings.

On April 1, 1997, the provisions of IIRIRA at issue here went into effect. *See* IIRIRA 309(a). Section 304(a) of IIRIRA combined and renamed the former deportation

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Cir. 1999). Some circuits held that Section 440(d) also did not apply to (some or all) immigrants who pled guilty to the disqualifying criminal offense before AEDPA's enactment. *See Mattis v. Reno*, 212 F.3d 31, 37 (1st Cir. 2000) (requiring showing of specific reliance); *Magana-Pizano*, 200 F.3d at 612-13 (same); *Tasios*, 204 F.3d at 550-52 (no specific reliance required); *Jideonwo v. INS*, 224 F.3d 692, 699-700 (7th Cir. 2000) (requiring specific reliance).

[2] In *LaGuerre v. Reno*, 164 F.3d 1035, 1041-44 (7th Cir. 1998), *cert. denied*, 120 S. Ct. 1157 (2000), the Seventh Circuit endorsed the Attorney General's reading of the temporal reach of AEDPA 440(d). Recently, the court substantially modified that result when it held that Section 440(d) does not apply to an immigrant who pled guilty before AEDPA's enactment and relied on the possibility of Section 1182(c) relief at the time of the plea. *See Jideonwo*, 224 F.3d at 699-700.

[3] *See, e.g., Reno v. Goncalves*, 526 U.S. 1004 (1999); *Reno v. Navas*, 526 U.S. 1004 (1999); *LaGuerre v. Reno*, 120 S. Ct. 1157 (2000).

and exclusion procedures into "removal" proceedings. It also established a new form of relief, called "cancellation of removal," that is available to qualifying immigrants whose criminal conviction does not constitute an "aggravated felony" under the INA. 8 U.S.C. 1229b(a). In IIRIRA 304(b), Congress repealed Section 1182(c), effective April 1, 1997. IIRIRA 309(a).

The government contended, and the BIA held in respondent's case, that under IIRIRA an alien in removal proceedings is never eligible to apply for relief under former Section 1182(c), regardless of the circumstances. The Second Circuit's ruling in this case is the first court of appeals decision squarely to address that question. Since the filing of the government's *certiorari* petition, one other court of appeals has done so. *See Richards-Diaz v. Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000).

The Second Circuit held in this case that some immigrants in removal proceedings are eligible to apply for relief under Section 1182(c). The court of appeals ruled that Section 1182(c) remains available for those immigrants who pled guilty, before the enactment of AEDPA and IIRIRA, to the criminal offense that would now disqualify them. In *Richards-Diaz*, the Ninth Circuit agreed that immigrants who entered pre-AEDPA/IIRIRA guilty pleas may be eligible for Section 1182(c) relief in removal proceedings, but limited its holding to those immigrants who "specifically relied on the availability of a discretionary waiver" under Section 1182(c) when they entered their guilty pleas. *Id.* at *4. No other court of appeals has squarely decided the effect of IIRIRA on Section 1182(c).

2. *Judicial Review.* Both AEDPA and IIRIRA also amended the INA provisions governing judicial review. AEDPA amended 8 U.S.C. 1105a, the provision governing review of deportation (and exclusion) orders, by enacting Sections 401(e) and 440(a). Section 401(e) repealed the INA habeas corpus provision, former 8 U.S.C. 1105a(a)(10), and Section 440(a) restricted "review by any court" of orders issued against aliens who were deportable on enumerated criminal grounds. IIRIRA then enacted two additional sets of jurisdictional changes. The first further amended the procedures applicable to pending deportation and exclusion orders by adopting special uncodified "transitional" rules to modify the requirements of 8 U.S.C. 1105a.[4] The second set – and the one at issue here – enacted a new "permanent" judicial review statute, codified at 8 U.S.C. 1252, to govern all immigration "removal" proceedings initiated on or after April 1, 1997. IIRIRA repealed Section 1105a altogether for those cases.

a. For deportation cases, AEDPA and IIRIRA's transitional rules maintained the prior provisions that placed exclusive review in the court of appeals by the petition-for-review procedure. However, they also imposed restrictions on review of final orders of deportation based on certain criminal convictions. *See* AEDPA 440(a); IIRIRA 309(c)(4)(G). These provisions led to substantial litigation in the circuit courts. Immigrants subject to the

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[4] *See* IIRIRA 309(c)(4). The "transitional" provisions apply to all deportation and exclusion cases initiated before April 1, 1997, in which the administrative order becomes final on or after October 31, 1996. *Id.*

restrictions sought to preserve the circuits' petition-for-review jurisdiction. Most courts of appeals held, however, that their own jurisdiction had been repealed but that district court habeas corpus actions were not necessarily foreclosed.[5]

Immigrants then brought habeas corpus actions under 28 U.S.C. 2241 to review claims that the courts of appeals had held the circuits could not hear by means of a petition for review. In particular, immigrants brought statutory retroactivity and constitutional equal protection challenges to the Attorney General's decision (in *In re Soriano, supra*) that AEDPA 440(d) had eliminated their eligibility to apply for discretionary waivers of deportation under Section 1182(c). The circuit courts, with one exception, ultimately held that neither claim could be brought in a petition for review because of the restrictions in AEDPA and IIRIRA's transitional rules, but that both claims were judicially reviewable in a district court habeas corpus action under 28 U.S.C. 2241.[6] These holdings were based on the ruling in *Felker v. Turpin*, 518 U.S.

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[5] *See, e.g., Kolster v. INS*, 101 F.3d 785, 790-91 (1st Cir. 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27, 31 (2d Cir. 1996); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996), *cert. denied*, 520 U.S. 1239 (1997); *Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir. 1998); *Chow v. INS*, 113 F.3d 659, 669 (7th Cir. 1997); *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996).

[6] *See Goncalves*, 144 F.3d at 118-26; *Henderson*, 157 F.3d at 118-22; *Sandoval*, 166 F.3d at 229-38; *Bowrin v. INS*, 194 F.3d 483, 486-89 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 305 (5th Cir. 1999); *Pak*, 196 F.3d at 670-73; *Shah*, 184 F.3d at 722-24; *Magana-Pizano*, 200 F.3d at 607-09; *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1142-47 (10th Cir. 1999); *Mayers*, 175 F.3d at 1295-1300. *But see LaGuerre*, 164 F.3d at 1040-41.

651, 660 (1996), that habeas corpus cannot be repealed by implication, as well as the courts of appeals' concern for the "profound" and "serious" constitutional questions that would be presented if review were wholly precluded.[7] The courts thus held that Section 2241 remained available for (at least) statutory retroactivity and constitutional challenges regarding eligibility for discretionary relief. This Court declined to review those decisions.[8]

b. The same jurisdictional question has now arisen under the IIRIRA *permanent* judicial review provisions, codified at 8 U.S.C. 1252 *et seq.*, that govern final orders of removal. Section 1252(a)(2)(C) provides that "no court shall have jurisdiction to review any final order of removal" based on an enumerated ground of deportation. The First, Second, Third and Ninth Circuits have held that Section 1252(a)(2)(C) repeals the circuit courts' own petition-for-review jurisdiction but that habeas corpus under 28 U.S.C. 2241 remains available to hear constitutional and statutory claims regarding statutory eligibility

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[7] *See Henderson*, 157 F.3d at 118-22. *See also Goncalves*, 144 F.3d at 122-23; *Sandoval*, 166 F.3d at 236-38; *Shah*, 184 F.3d at 724.

[8] *See, e.g., Reno v. Goncalves*, 526 U.S. 1004 (1999); *Reno v. Navas*, 526 U.S. 1004 (1999). The Court vacated and remanded *INS v. Magana-Pizano*, 526 U.S. 1001 (1999), in light of this Court's intervening decision in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999). The Ninth Circuit in *Magana-Pizano* had issued a constitutionally-based decision because an earlier circuit precedent had held that Section 2241 had been repealed. On remand, the Ninth Circuit held that Section 2241 was not repealed, basing its decision on the same statutory grounds adopted by the other courts of appeals. *See Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999).

for discretionary relief.[9] Those courts have again noted the "profound" (Pet. App. 61a) constitutional question that would be presented if all review of pure statutory or constitutional claims were precluded.[10] In contrast, as petitioner notes, the Fifth and Eleventh Circuits have issued opinions finding that Section 1252 generally repealed the district courts' habeas corpus jurisdiction under 28 U.S.C. 2241. The cases in those circuits have not resolved the types of claims that can be heard in a petition for review, and the principal decisions do not directly present a constitutional or statutory challenge to the denial of eligibility for a discretionary waiver of removal.[11]

STATEMENT OF FACTS

1. Enrico St. Cyr is a Haitian citizen who has been a legal permanent resident of the United States for 14

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[9] *See Mahadeo v. Reno*, 226 F.3d 3 (1st Cir. 2000), *petition for cert. pending*, No. 00-962; *Calcano-Martinez*, Nos. 98-4033 et al., 2000 WL 1336611 (2d Cir. Sept. 1, 2000), *petition for cert. filed*, (Dec. 20, 2000); *Liang v. INS*, 206 F.3d 308 (3d Cir. 2000), *petition for cert. pending sub nom. Rodriguez v. INS*, No. 00-753; *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000); *Richards-Diaz v. Fasano*, No. 99-56530, 2000 WL 1715956 (9th Cir. Nov. 17, 2000).

[10] *See also Mahadeo*, 226 F.3d at 10; *Liang*, 206 F.3d at 315, 321; *Flores-Miramontes*, 212 F.3d at 1141, 1142.

[11] *See Max-George v. Reno*, 205 F.3d 194 (5th Cir. 2000), *petition for cert. pending*, No. 00-6280 (challenging whether alien was deportable); *Richardson v. Reno*, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000) (challenging detention).

years. He was lawfully admitted in 1986 at the age of 18. Both his parents and one sister are United States citizens. His other siblings are lawful permanent residents. Respondent has no family in Haiti. Pet. App. 2a.

On March 8, 1996, before the enactment of AEDPA and IIRIRA, respondent pled guilty to a controlled substance offense under Connecticut state law. Pet. App. 3a. At his immigration hearing, respondent conceded deportability under 8 U.S.C. 1227(a)(2)(A)(iii) and sought to apply for a waiver of deportation under former 8 U.S.C. 1182(c). Pet. App. 4a. The immigration judge (IJ) denied respondent the opportunity to apply on the ground that IIRIRA had repealed Section 1182(c) as of April 1, 1997. *Id.* The BIA affirmed. *Id.*

2. Respondent filed a writ of habeas corpus in the district court. The court found that IIRIRA "ha[d] not explicitly repealed" Section 2241 habeas jurisdiction and held that it retained habeas corpus jurisdiction over respondent's statutory retroactivity claim. Pet. App. 82a. On the merits, the district court held that the repeal of Section 1182(c) did not apply to respondent and reversed the order of the BIA.[12]

The Second Circuit affirmed. The court's jurisdictional ruling applied the unanimous holding issued the

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[12] The district court consolidated respondent's case with two other habeas corpus actions involving final orders of deportation (rather than removal), and the government contested the court's jurisdiction only in respondent's case. On the merits of the other two cases, the government appealed only one, which is pending before the court of appeals. *Domond v. INS*, No. 99-2619 (2d Cir.).

same day by the same panel in *Calcano-Martinez v. INS*, stating that the INS's jurisdictional arguments were "foreclosed by [the] decision in *Calcano-Martinez*." Pet. App. 6a. The court ruled that, in light of *Calcano-Martinez*, "the permanent rules of IIRIRA do not divest Article III courts of their habeas jurisdiction under 28 U.S.C. § 2241 to review statutory and constitutional challenges to final removal orders when no other avenue for judicial review is available" because of the restriction in Section 1252(a)(2)(C). *Id.* (citing *Calcano-Martinez*).

On the merits, the court of appeals considered whether AEDPA or IIRIRA had eliminated eligibility for Section 1182(c) relief for immigrants in removal proceedings. The court applied the two-step test of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), to determine (1) whether Congress had expressly prescribed the temporal reach of AEDPA and IIRIRA, and (2) absent such express command, whether eliminating eligibility for Section 1182(c) relief would have "retroactive effect." Pet. App. 13a (quoting *Landgraf*).

Under step one, the court rejected the government's contention that the 1996 amendments contained an express command indicating that the amendments applied retroactively to all cases and found that both AEDPA and IIRIRA were ambiguous, with "no clear evidence that Congress considered and decided" that the amendments regarding Section 1182(c) should apply to an alien "who pled guilty to the underlying criminal conduct before [the amendments'] enactment." Pet. App. 21a. In finding that the temporal reach of the amendments was ambiguous, the court also rejected respondent's contention that the language and structure of

IIRIRA demonstrated that Congress explicitly intended IIRIRA to apply only *prospectively* to post-enactment convictions. *Id.* n.5.

The court of appeals then turned to the second *Landgraf* step, *i.e.*, "whether applying IIRIRA § 304(b) to pre-enactment convictions is impermissibly retroactive." Pet. App. 23a. The opinion first noted the difference between, on the one hand, the act of committing a criminal offense and, on the other hand, the act of pleading guilty in lieu of going to trial. Pet. App. 25a. The court of appeals rejected finding a retroactive effect based solely on criminal *conduct* that occurred before AEDPA and IIRIRA. Pet. App. 26a. But the court held that a *guilty plea* entered into before the change in law was different. Aliens charged with crimes, the court noted, "factor the immigration consequences of conviction in deciding whether to plea or proceed to trial[,]" *id.* (citations omitted), because the availability of relief from deportation is an important consideration at the plea stage and criminal defense counsel are commonly required to advise immigrants of the immigration consequences of a guilty plea. Pet. App. 27a. At the time of respondent's pre-AEDPA/IIRIRA plea, the court explained, "there was a strong possibility that [an immigrant] would receive relief" if his application for Section 1182(c) relief were adjudicated. Pet. App. 28a (citing *Tasios*, 204 F.3d at 551). Therefore, the court concluded, eliminating respondent's eligibility for a Section 1182(c) waiver "eradicates a form of relief previously available . . . [and] attach[es] new substantive legal consequences to a guilty or *nolo contendere* plea. . . . " Pet. App. 30a.

Judge Walker dissented on the merits. He concluded that, under step one of *Landgraf*, IIRIRA's repeal of former

Section 1182(c) applied to all removal cases regardless of the date of the criminal conduct, conviction, or plea and, alternatively, that under step two, the elimination of discretionary relief does not have retroactive effect. *Id.*

REASONS FOR DENYING THE WRIT

Neither of the questions presented by the petition for *certiorari* should be reviewed by the Court in this case. The jurisdictional question, if reviewed at all, should be addressed in *Calcano-Martinez v. INS, petition for cert. filed,* (Dec. 20, 2000), where the issue is more fully presented. The merits question is not worthy of review because it raises no broad issues of retroactivity, is limited to a closed set of cases and correctly applies this Court's retroactivity jurisprudence.

1. *Jurisdiction.* The jurisdictional issue should not be reviewed by this Court but is, in any case, more completely presented in the *certiorari* petition in *Calcano-Martinez.*

a. Respondent acknowledges that the courts of appeals are divided on the general issue of the district courts' habeas corpus jurisdiction to review challenges to final orders of removal governed by 8 U.S.C. 1252(a)(2)(C). That circuit split, however, simply leaves standing an already-existing division that has been present under IIRIRA's transitional jurisdictional rules since 1998. The majority of circuits held, like the Second Circuit here, that habeas corpus under 28 U.S.C. 2241 remained available for the type of statutory retroactivity claim presented by this respondent. *See* note 6, *supra.* But the

Seventh Circuit held that all such claims could be heard (if at all) only by a petition for review. *See LaGuerre*, 164 F.3d at 1040. Notwithstanding the substantial number of cases subject to these divergent rulings,[13] this Court several times declined to resolve that jurisdictional split.[14]

Moreover, under the permanent rule cases, the decisions of the Fifth and Eleventh Circuits cited by petitioner (Pet. Br. 19-20), did not squarely rule on the availability of habeas jurisdiction to review claims that cannot be brought by a petition for review. The Fifth Circuit in *Max-George v. Reno*, 205 F.3d 194, 197-98 (5th Cir. 2000), found that habeas corpus was repealed for immigrants governed by Section 1252(a)(2)(C), but the specific claim presented by the alien in that case was whether a new ground of deportation applied to him. The Fifth Circuit held that the claim could have been presented in a petition for review (and that the alien would lose on the merits). *See id.* at 199-201. The decision does not squarely hold that habeas corpus is never available, even for claims that are barred from being heard in a petition for review.[15] The Eleventh Circuit's ruling in *Richardson v.*

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[13] *See, e.g.*, Brief for Petitioner [Reno] at 24, *Reno v. Navas*, No. 98-996 (noting thousands of cases potentially governed by jurisdictional holding).

[14] *Compare Reno v. Goncalves*, 526 U.S. 1004 (1999) *and Reno v. Navas*, 516 U.S. 1004 (1999) (circuit rulings requiring challenge by habeas corpus) *with LaGuerre v. Reno*, 120 S. Ct. 1157 (2000) (circuit decision requiring challenge by petition for review) *and Richardson v. Reno*, 120 S. Ct. 1529 (2000) (same for removal cases).

[15] *See* Brief for Respondents [Reno et al.] at 18, *Max-George v. Reno*, No. 00-6280 (explaining that "petitioner plainly could

Reno, 180 F.3d 1311 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1529 (2000), was similarly limited. As the petitioner states, that case challenged the alien's detention during removal proceedings, and not the removal order itself – which had not yet issued. Pet. Br. 20 n.16 (acknowledging that *Richardson* concerns detention and not a final removal order). Subsequent decisions of the Fifth and Eleventh Circuits have applied the rulings in *Richardson* and *Max-George* without additional analysis regarding claims that could not be heard in a petition for review.[16]

b. The Second Circuit's ruling in this case that respondent's claims are reviewable in a district court habeas corpus action under 28 U.S.C. 2241 is correct and based on the settled precedent of this Court. The Second Circuit's statutory interpretation relies on the clear statement rule of *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), to find that Congress has not legislated with sufficient specificity to repeal 28 U.S.C. 2241.

Equally important, the court of appeals' resolution avoids the serious constitutional issues raised by the

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have raised [his challenge that he was not actually removable] in a petition for review in the court of appeals, but he failed to do so" and that decision "does not present [the] constitutional concern [of complete denial of judicial review] because . . . a judicial forum was indeed available").

[16] *See* Pet. Br. 20 nn.15 & 16 (citing *Perez v. Reno*, 227 F.3d 294 (5th Cir. 2000); *Garnica-Vasquez v. Reno*, 210 F.3d 558 (5th Cir. 2000); *Finlay v. INS*, 210 F.3d 556 (5th Cir. 2000); *Russell v. Reno*, 216 F.3d 1091 (11th Cir. 2000), *petition for cert. pending*, No. 00-5970; *Alanis-Bustamante v. Reno*, 201 F.3d 1303 (11th Cir. 2000)).

petitioner's contention that *no* court may review respondent's statutory retroactivity claim. Pet. Br. 25-26. Petitioner argues that complete preclusion of respondent's statutory claim is constitutionally permissible and does not even raise "constitutional concerns." Pet. Br. 25. Yet decades of consistent judicial adjudication confirm that the scope of review mandated by the Constitution's Suspension of Habeas Corpus Clause, Art. I., § 9, cl. 2, encompasses both constitutional and statutory claims of the type raised here. The Second Circuit has exhaustively reviewed this authority and concluded that the government's contention that "no court has the power to review [the Attorney General's] interpretation of the immigration laws . . . is . . . at war with the historical record . . . [and] the core conception of habeas corpus as it has been applied over many centuries." *Henderson v. INS*, 157 F.3d at 120. Indeed, "the traditional Great Writ was largely a remedy against executive detention," which is at issue here, *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring), and in that context encompasses errors of law.

Even apart from the particular force of the Suspension Clause, Article III does not permit respondent's legal claims to be adjudicated entirely by the Executive Branch without any access, by appeal or otherwise, to a judicial forum, *see Commodities Future Trading Comm'n v. Schor*, 478 U.S. 833 (1986). Similarly, the Due Process Clause requires judicial review of respondent's statutory claims because deportation of a long-time legal resident implicates fundamental interests "basic to human liberty and happiness." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

In light of these concerns, the Second Circuit properly rejected the contention that IIRIRA prohibits review in *any* court of respondent's claims. The court of appeals correctly ruled that respondent may obtain review of his claims in district court under Section 2241.[17]

c. If the Court determines that review of the jurisdictional question is warranted, then the Court should grant review of that issue in *Calcano-Martinez* because it is the more complete and appropriate vehicle.

First, as the petitioner explains, *Calcano-Martinez* is the decision in which the Second Circuit issued its principal jurisdictional holding, and the jurisdictional issue in this case was simply disposed of under the *Calcano-Martinez* ruling.[18]

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[17] Respondent's particular circumstances would raise ancillary issues if this Court were now to hold that the Second Circuit erred and that respondent's claims can be reviewed only by a petition for review. The Second Circuit concluded that its decision finding a repeal of its own petition-for-review jurisdiction under IIRIRA's permanent provisions was compelled by the circuit's prior precedent construing the transitional provisions. Pet. App. 6a. If this result were now to change, respondent must be entitled to pursue his claims in some judicial forum to avoid unfairness. *Cf. Singh v. Perryman*, 182 F.3d 504, 508-09 (7th Cir. 1999) *and Turkhan v. Perryman*, 188 F.3d 814, 824 (7th Cir. 1999) (finding that change in circuit jurisdictional law constitutes manifest injustice and requires finding alternative jurisdictional basis).

[18] The Solicitor General acknowledges that *Calcano-Martinez* constitutes the Second Circuit's decision on the jurisdictional issue but explains that the government did not seek review from that decision because the government "nominally prevailed" (Pet. Br. 19 n.13) when the court of appeals dismissed the petition for review for lack of jurisdiction

Second, in *Calcano-Martinez* the three immigrants had filed *both* a petition for review and a habeas corpus petition (raising the same types of statutory and constitutional claims as are presented in this case). Pet. App. 42a. The court of appeals in *Calcano-Martinez* thus exhaustively addressed the court's own petition-for-review jurisdiction as well as the district courts' habeas corpus jurisdiction.[19] Pet. App. 54a-73a; Pet. Br. 11. The court's conclusion that jurisdiction lay in habeas corpus was inextricably intertwined with its predicate determination that the circuit's petition-for-review jurisdiction was repealed by 8 U.S.C. 1252(a)(2)(C). As the circuit courts agree, the role of habeas corpus to review final removal orders cannot be divorced from the petition-for-review jurisdiction of the courts of appeals in light of Section 1252(a)(2)(C).

Moreover, as the circuits have recognized, a profound constitutional question arises if *no* court – either in habeas corpus or by petition for review – has jurisdiction over respondent's claims. Therefore, whether either avenue has been repealed cannot be separated from whether the alternative avenue has been preserved. The availability of habeas review must be considered in light of the full statutory and constitutional framework in order not to needlessly embroil the Court in constitutional adjudication.

(albeit on grounds with which the government disagreed). Pet. App. 6a.

[19] The immigrants in *Calcano-Martinez* had previously filed district court habeas actions, but they had not been adjudicated by the district court at the time of the court of appeals' decision.

2. *Retroactivity*. The court of appeals' holding that former Section 1182(c) is not repealed in the case of immigrants who pled guilty to a deportable offense before AEDPA and IIRIRA is correct and does not warrant review. The question does not raise an issue of broad significance because it affects only a discrete number of cases, has not generated any substantial disagreement among the circuits (and should await a definitive resolution of the jurisdictional question).

a. The court of appeals' decision raises no question of broad application under the now well-established framework for resolving retroactivity issues. Four recent decisions of this Court have exhaustively addressed how courts are to determine if a new statute applies to pre-enactment conduct. *See Martin v. Hadix*, 527 U.S. 343 (1999); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The issue presented here raises no new questions regarding the proper judicial approach for discerning whether Congress intended a statute to apply retroactively.

This case concerns only the application of the settled retroactivity test to the particular statute at issue in this case, and, even more narrowly, to the particular circumstances raised by the respondent under that statute (*i.e.*, guilty pleas). Petitioner does not contend that the court of appeals misstated the governing test or failed to apply it in this case. The court of appeals properly followed the two-step test mandated by *Landgraf* and considered, first, whether Congress had expressed its intent that the new statute apply retroactively and second, finding no clear congressional intent, whether the statute would have an

impermissible "retroactive effect" if applied to respondent's case. Petitioner's only quarrel is with the result of the court of appeals' application of that established test to the particular circumstances presented here. But, as to that question, only two courts of appeals have spoken and, as set forth more fully below, *see* 2.c., *infra*, it is premature for this Court to grapple with that narrow issue.

b. The court of appeals' decision governs only a discrete and diminishing number of removal cases and hence has no enduring significance. The ruling preserves the availability of Section 1182(c) only for a fixed number of immigrants whose factual circumstances are the same as those presented by respondent. The impact of the decision is necessarily short-lived and its scope is limited because immigrants qualify for Section 1182(c) under the court of appeals' decision only if they meet three specific conditions.

First, the relevant conduct must, of course, have occurred before the effective dates of AEDPA and IIRIRA. Otherwise it does not constitute pre-enactment conduct, and is concededly governed by all of the AEDPA and IIRIRA restrictions on eligibility.

Second, the court of appeals found retroactive effect *only* if the immigrant actually pled guilty (or *nolo contendere*). The court of appeals specifically distinguished cases where the immigrant was convicted after trial, Pet. App. 31a, or where the only pre-enactment conduct was the commission of the criminal act. Pet. App. 25a. Therefore, under the court of appeals' decision, the only immigrants in removal proceedings entitled to pursue a claim for

Section 1182(c) relief are those with guilty pleas before AEDPA and IIRIRA.

Finally, and significantly, the court of appeals' decision left in place the pre-AEDPA/IIRIRA restrictions on eligibility for Section 1182(c) relief. Thus, with the exception of aberrational cases, only immigrants who are released from incarceration before the end of 2001 could benefit from the court's ruling. Immigrants still imprisoned at that time are virtually certain to be barred from Section 1182(c) eligibility regardless of the ruling in this case because they will be unable to satisfy a critical pre-AEDPA/IIRIRA criterion for Section 1182(c) relief, namely, that their term of imprisonment must be less than five years. *See* Pet. Br. 3 (noting five-year bar in pre-AEDPA Section 1182(c)).[20] Petitioner's focus on the date

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[20] Before the 1996 amendments, Section 1182(c) already prohibited relief to immigrants whose disqualifying aggravated felony offense resulted in their imprisonment for five years or longer. 8 U.S.C. 1182(c) (1994) (immigrant convicted of aggravated felony disqualified if has served "a term of imprisonment of at least five years"). That pre-AEDPA restriction applies to all applications and is unaffected by this decision because it was part of Section 1182(c) before AEDPA or IIRIRA. Given that the court of appeals' decision requires a plea that pre-dates AEDPA and that sentencing and incarceration occurs upon entry of a plea (*see generally* 18 U.S.C. 3143 (mandating detention upon finding of guilt), 18 U.S.C. 3585 (calculating length of imprisonment from date of detention)), any immigrant with an aggravated felony conviction who remains in prison past the middle or end of 2001 would almost certainly be barred from eligibility for Section 1182(c) on the ground of having been imprisoned five years or more. (The five-year rule does not apply to *non*-aggravated felonies, but those immigrants would be eligible for "cancellation of removal" and

of conviction without regard to the term of imprisonment (or whether the alien pled guilty) is, therefore, misplaced.

c. Only two courts of appeals, the Second and Ninth, have squarely addressed whether an immigrant subject to removal proceedings remains eligible to apply for Section 1182(c). They agree in most respects and disagree only marginally.

In *Richards-Diaz v. Fasano*, the Ninth Circuit held that some immigrants in removal proceedings remain eligible for Section 1182(c) waivers. It ruled that immigrants who entered into pre-AEDPA/IIRIRA guilty pleas in reliance on the availability of Section 1182(c) are entitled to apply for such relief in removal proceedings because elimination of eligibility under those particular circumstances would have an impermissible retroactive effect. *See* 2000 WL 1715956, at *4 (impermissible retroactive effect if "plea was entered in reliance on the availability of discretionary waiver under [Section 1182(c)]") (citation omitted).

The Second and Ninth Circuits thus agree that IIRIRA did not completely repeal Section 1182(c) eligibility for immigrants in removal proceedings, that the elimination of relief from deportation may have a retroactive effect under some circumstances, and that the critical pre-enactment conduct on which eligibility depends is a guilty plea entered into before AEDPA was enacted. Moreover, both courts found that other pre-enactment conduct, such as the commission of the offense or a

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would not be seeking Section 1182(c) relief. 8 U.S.C. 1129b(a)(3)).

conviction after trial, would *not* preserve eligibility for Section 1182(c). Pet. App. 25a-26a; *Richards-Diaz*, 2000 WL 1715956, at *4. Therefore, the threshold requirement in both circuits is the same, *i.e.*, whether the immigrant *pled guilty* before AEDPA's enactment on April 24, 1996.

The only disagreement between the Second and Ninth Circuits concerns which pre-AEDPA guilty pleas preserve eligibility for Section 1182(c) relief. The Ninth Circuit requires a showing of specific reliance on Section 1182(c) at the time of the guilty plea, 2000 WL 1715956, at *4, while the Second Circuit does not require such an individualized showing. Pet. App. 30a. That difference in outcome is not sufficient to warrant this Court's attention, especially when neither circuit has yet elaborated on how it will apply its formulation and other circuits have not yet squarely addressed the question.

One essential lesson of the transitional rule decisions under AEDPA 440(d) is that development in the circuits is especially appropriate on the retroactivity issue because apparent splits may be resolved or substantially narrowed by subsequent circuit court decisions. For example, in *LaGuerre v. Reno*, the Seventh Circuit appeared definitively to foreclose all Section 1182(c) eligibility for immigrants in deportation proceedings as of AEDPA's enactment. Yet, a few months ago in *Jideonwo v. INS*, 224 F.3d 692 (7th Cir. 2000), the Seventh Circuit significantly refined its view and limited the effect of *LaGuerre*. *Jideonwo* held that immigrants in deportation proceedings who relied on Section 1182(c) when they entered into pre-AEDPA pleas remain eligible for Section 1182(c) relief

notwithstanding the *LaGuerre* decision.[21] Until the circuits squarely address the precise issue in a case that directly presents it, predictions of a likely or permanent disagreement are premature.[22]

d. The court of appeals' decision was correct. The government argues that Congress expressly intended to repeal Section 1182(c) for immigrants in removal proceedings based on the fact that IIRIRA replaced "deportation" with "removal" procedures and that the repeal of Section

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[21] *Jideonwo* held that AEDPA 440(d) cannot be applied to an alien "who pled guilty . . . before the enactment of AEDPA and relied, at least in part, on the availability of [Section 1182(c)] relief. . . . " 224 F.3d at 700. The court explained that "an alien accused of a crime that carries a lengthy sentence [may] enter into a plea agreement that would preserve his eligibility" for Section 1182(c) relief. *Id.*

[22] Thus, even though the Ninth Circuit expressed its disagreement with the Second Circuit's analysis of congressional intent, 2000 WL 1715956, at *3-*4 & n.4, the two courts, as noted above, differ only minimally in terms of *result*. Petitioner cites decisions from the Seventh and Eleventh Circuits and asserts that these cases "cannot be squared" with the Second Circuit's decision. Pet. Br. 28. Yet neither of the cases constitute a true conflict with this case or *Richards-Diaz*. Pet. Br. 28-29. *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000), concerned a constitutional claim regarding the timing of INS's initiation of proceedings. The court specifically stated that "we do not face a question of retroactivity" but rather the question of "at what point proceedings . . . commence." *Id.* at 981. *Galindo-Del Valle v. Attorney General*, 213 F.3d 594 (11th Cir. 2000), rejected a constitutional challenge to AEDPA 440(d) on the ground that the alien lacked standing to bring the claim. The alien there did not bring any challenges – statutory or constitutional – to *IIRIRA*'s effect on Section 1182(c). Therefore, the Eleventh Circuit had no occasion to decide the retroactivity question presented to the Second Circuit in this case.

1182(c) took *effect* on April 1, 1997. Pet. Br. 27. But in *Landgraf* this Court underscored that only express and unambiguous language that lends itself to no other interpretation is sufficient to conclude that Congress intended to reach pre-enactment conduct. *See Landgraf*, 511 U.S. at 245. The Court rejected reliance on a general effective date provision because "a statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Id.* at 257. IIRIRA does not contain any express statement of congressional intent to apply the repeal of Section 1182(c) retroactively to cases (be they deportation or removal) involving pre-enactment guilty pleas. The government's further contention that deportation statutes are not subject to the presumption against retroactivity is contrary to this Court's unanimous holding in *Hughes Aircraft* that *all* statutes (except those that are purely jurisdictional), including new laws that eliminate defenses rather than imposing new grounds of liability, are presumed to apply only prospectively. *See Hughes*, 520 U.S. at 946. The court of appeals thus correctly applied the presumption against retroactivity and, moreover, based its narrow preservation of Section 1182(c) on its observation that immigrants consider the immigration consequences and the availability of discretionary relief at the time of a plea.[23]

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[23] The petitioner's reliance on *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is misplaced. Pet. Br. 27-28 & n.19. *Lopez-Mendoza* concerned application of the exclusionary rule in a case where an alien with no lawful status

CONCLUSION

Respondent submits that the *certiorari* petition should be denied. Alternatively, if the Court determines that review of the jurisdictional question is warranted, *certiorari* should be granted instead (or in addition) in *Calcano-Martinez*.

Respectfully submitted,

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sought to remain in the United States. Its analysis bears little relationship to the question of whether a new statute should be applied retroactively to pre-enactment conduct, thereby repealing a longstanding, legislatively-established form of relief. There is no "ongoing violation" of the immigration laws if the BIA erred in its interpretation of IIRIRA and *Congress* never intended to repeal eligibility for relief retroactively. Similarly, *Chevron* does not usurp the courts' obligation to apply the *Landgraf* test to determine whether Congress has expressed the requisite intent to apply a new law retroactively.